



HIPAA and the Telephone Consumer Protection Act: What Risks Loom in Contacting Patients by Phone and Text Messages?

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Confidentiality Coalition



A broad group of organizations working to ensure that we as a nation find the right balance between the protection of confidential health information and the efficient and interoperable systems needed to provide the very best quality of care.

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Background on HIPAA Privacy Rule and Marketing

- •The HIPAA Privacy Rule generally prohibits a covered entity from using or disclosing protected health information ("PHI") for marketing purposes without a written authorization from the individual to whom the information pertains.
- •"Marketing" generally means making:
 - "a communication about a product or service that encourages recipients of the communication to purchase or use the product or service." 45 C.F.R. § 164.501.

Exceptions to the HIPAA Definition of "Marketing"

- Unless the covered entity making the communication is compensated for making the communication, the Privacy Rule considers certain "health care management/treatment" messages not to be "marketing"
- This allows a covered entity, if it is not remunerated for doing so, to communicate with patients without their prior authorization in order to:
 - Describe a health-related product or service provided by or included in the benefits coverage of the covered entity making the communication;
 - o Encourage the use of a product or service but constitute "treatment"; and
 - Provide guidance to manage care or to recommend alternative treatments, therapies, health care providers, or settings of care.

FCC and FTC Regulation of Telemarketing

- •By statute, both the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) regulate telemarketing, which includes calls and text messages encouraging use/purchase of health care products or services.
 - Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA) implemented by the FCC
 - Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C.
 §§ 6101-6108 implemented by the FTC
- •These statutes strictly regulate:
 - o "autodialed" calls and text messages
 - calls made using an artificial or prerecorded voice

FCC and FTC Treatment of Health-Related Marketing Communications

- •In recognition of the exemption of "health care management/treatment" communications from the HIPAA Privacy Rule's requirement for an authorization to make marketing communications, the FCC and FTC decided to give special leeway for calls that:
 - describe a health-related product or service
 AND
 - o are made by a HIPAA covered entity or business associate.
- •CAUTION: There are nuances and those create significant risk, particularly under the TCPA.

TCPA Liability & Enforcement

- FCC enforcement actions
- Private right of action
- State laws are not preempted
- \$500 per violation
- Treble damages for each willful or knowing violations

Examples of TCPA Settlements

Case	Settlement Total
Gehrich v. JP Morgan Chase	\$34m
In Re:Midland Credit Management Inc., TCPA Litigation	\$20.5m
Sanders v. RBS Citizens	\$4.551m
Allen v. JP Morgan Chase	\$10.2m
Ossola v. Am. Express Co.	\$9.25m
Ikuseghan v. Multicare Health System	\$2.5m
Sirius XM TCPA Litigation	\$35m
Birchmeier v. Caribbean Cruise Line Inc.	\$56-76m

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Threshold TCPA Issues

- Will you be calling a landline or a cell phone?
- Do you need to use an artificial or prerecorded voice?
- Do you need to use an autodialer?
 - Many patient engagement tools may be autodialers because they have the capacity:
 - dial calls or send texts to a list of stored numbers, and/or
 - dial phone numbers predictively.
 - In the FCC's view, capacity is not limited to "present ability" it also includes "future ability"
 - But recent D.C. Circuit decision rejects that "future" view
- Can you obtain prior consent from the called party?

General TCPA Rules

- Purely informational (not telemarketing) artificial voice or prerecorded calls may be made to residential landlines without any consent.
- Purely informational autodialed or artificial voice/prerecorded calls may be made to wireless lines only if there is prior express consent
- Any telemarketing calls using a prerecorded message or artificial voice, and any autodialed telemarketing calls to cell phones, require prior express <u>written</u> consent
- Limited exceptions for:
 - Emergency calls
 - Calls by tax-exempt nonprofits
 - Certain HIPAA-covered health care calls

What is Prior Express Written Consent?

 A signed written agreement clearly authorizing autodialed or prerecorded calls to a wireless number or a prerecorded calls to a residential landline.

• Must:

- Specify the telephone number to which the person is consenting to be called;
- Acknowledge that providing consent is not a condition of purchasing goods or services.
- Electronic signatures qualify as "written" consent, e.g., via:
 - E-mail
 - Text message
 - Telephone keypress
 - Voice recording

Special Rules for Healthcare-Related Telemarketing Calls

- •A "telemarketing" healthcare-related call may be made:
 - To a landline phone using a prerecorded/artificial voice without any consent if it is made by a HIPAA covered entity or its business associate
 - The FCC exempted from any consent requirements "all prerecorded health care-related calls to residential lines that are subject to HIPAA."
 - To a cell phone using an autodialer or prerecorded/artificial voice if:
 - The call is made by a HIPAA covered entity or its business associate
 AND
 - The called party has given prior express consent

What is Prior Express Consent?

• FCC:

 Knowingly providing a phone number is "in effect" consenting to be called at that number, "absent instructions to the contrary"

Caselaw examples:

- o Baisden v. Credit Adjustments, Inc. (6th Cir. 2016) provision of a cell phone number to a hospital that then provides the cell phone number to an affiliated physicians' group that provided medical services to a consumer arising out of the same occurrence can constitute "prior express consent."
- Baird v. Sabre, Inc., 2016 WL 424778 (9th Cir. 2016). Consumer expressly consented to receive text messages from Sabre when she provided her cellphone number to Hawaiian Airlines.

Non-Telemarketing Healthcare-Related Calls

- •An "informational" healthcare-related call may be made:
 - By any entity using a prerecorded/artificial voice to a landline phone without any consent
 - By any entity using an autodialer or prerecorded/artificial voice to a cell phone if there is prior express consent
 - By a HIPAA covered health care provider to a cell phone without any consent – subject to strict limitations

Healthcare Calls/Text Messages to Cell Phones Requiring No Consent

- Must be from a HIPAA covered health care provider or its business associate
- Must provide a "treatment" message
- Must be free to the recipient of the call (typically a patient)
- Must be sent only to the number provided by the patient
- Must state the name and contact information for the provider
- Must be concise
 - Cannot exceed 1 minute (call) or 160 characters (text message)
 - Must be infrequent
 - One call per day / three per week
 - Must include an easy means to opt out
 - Opt-out requests must be honored immediately.

Key Legislation on TCPA in 115th Congress

Key Legislation

- •S. 564 HANGUP Act Introduced in Senate (03/08/2017) Sen. Markey Read twice and referred to Commerce, Science and Transportation Committee.
- •H.R. 290 Federal Communications Commission Process Reform Act of 2017 Rep. Walden Passed House without amendment (01/23/2017) House Energy and Commerce Committee Received in Senate and read twice and referred to Commerce, Science and Transportation Committee.
- •H.R. 4986 FCC Reauthorization Act of 2018 House Energy and Commerce Committee, Transportation and Infrastructure, Oversight and Government Reform. Senate -03/07/2018 Received in Senate and read twice and referred to Commerce, Science and Transportation Committee.

House Energy and Commerce Committee Hearing on "Modernizing the Telephone Consumer Protection Act"

- On September 22, 2016, the House Energy and Commerce Subcommittee on Communications and Technology considered the challenges encountered by consumers and companies in a world where technology and consumer behavior have evolved faster than the legislative language of the Telephone Consumer Protection Act of 1991.
- Michelle Turano, Vice President of Government Affairs and Public Policy at WellCare, testified, and expressed the need to align TCPA with HIPAA regulations.

Source: <u>Background memo from House Energy and Commerce Committee Hearing on</u>
<u>"Modernizing the Telephone Consumer Protection Act"</u>

House Judiciary Committee Hearing on Lawsuit Abuse and the "Telephone Consumer Protection Act"

- On June 13, 2017, the House Judiciary Subcommittee on the Constitution and Civil Justice held hearing on Lawsuit Abuse and TCPA.
- Becca Wahlquist, Partner at Snell & Wilmer LLP, testified, and explained that FCC has not clarified healthcare exemptions to TCPA liability.
- As a result, pharmacies have been the targets of TCPA lawsuits for communications related to flu shot and pharmacy refill reminders.
- Adonis Hoffman, Founder & Chairman of Business in the Public Interest, also testified and noted how healthcare companies have petitioned the FCC to clarify its interpretation of certain TCPA provisions.

Source: Witness testimony from Snell & Wilmer LLP, and Business in the Public Interest

TCPA Petitions

Anthem, Inc.; Blue Cross Blue Shield Association; Wellcare Health Plans, Inc.; American Association of Healthcare Administrative Management (filed July 28, 2016)

- •Sought clarification from FCC on two items:
- •1) That the provision of a phone number to a "covered entity" or "business associate" as defined under HIPAA, establishes prior express consent for non-telemarketing calls permissible under HIPAA for treatment, payment and/or healthcare operations.
- •2) That the term "healthcare provider" as stated in the 2015 Omnibus TCPA Order include "HIPAA covered entities and business associates."
- Petitioners maintain clarifications are needed to align TCPA and HIPAA.

Source: TCPA FCC Petitions Tracker

Pharmaceutical Company Petition

- Filed comments in support of Anthem Petition.
- Pharmaceutical companies are rarely covered entities" or "business associates" under HIPAA.
- Asked FCC to extend proposed relief for HIPAA covered entities to pharmaceutical manufacturers who make calls as part of a patient support initiative.
- Pharmaceutical companies indicate these manufacturer patient support programs promote communications related to treatment, case management and coordination.

Anthem, Inc. (Filed June 10, 2015)

- Anthem sought a declaratory ruling and exemption regarding nontelemarketing healthcare calls.
- Asked FCC to make non-telemarketing healthcare calls/text messages from plans/providers answer to an "opt out" consent rule.
- Anthem opines these calls provide important and relevant information to patient about their health.

Source: TCPA FCC Petitions Tracker

Industry Reaction

- FCC's interpretation of TCPA has not recognized pre-existing regulation under HIPAA, which allows health plans and their business associates to use protected health information (PHI) for treatment, payment and healthcare operations messages.
- Ambiguity surrounding FCC's interpretation adversely affects ability of managed care plans to reach out to members.

Source: Witness testimony from WellCare, House Energy and Commerce Committee, 9/22/16

Industry Reaction

- Misinterpretation of 2015 Declaratory Order would restrict the "scope of exempted calls or text messages made by or on behalf of provider."
- Too limited an interpretation and could exclude pertinent HIPAA covered entities (i.e., health plans).
- AHIP believes this unintended consequence could limit cutting edge non-marketing healthcare communications.

Source: <u>Document for Record- Rep. Latta on behalf of Rep. Bilirakis – AHIP Comments</u>, House Energy and Commerce Committee, 9/22/16

TCPA Recommendations

- WellCare recommends Congress indicate the "provision of a phone number to a HIPAA covered entity or business associate establishes prior 'express consent' for healthcare treatment, payment and operations, and communication to that number."
- Recommends Congress examine the intent of the caller.
- Congress should remove the FCC's strict liability interpretation.

Source: Witness testimony from WellCare, House Energy and Commerce Committee, 9/22/16

TCPA Recommendations

- WellCare recommends the FCC confirm the use of health plan member phone numbers under TCPA align with HIPAA regulations.
- TCPA alignment with HIPAA will allow members to receive important calls permissible under HIPAA.
- FCC should update policy related to reassigned phone numbers to ensure members are not bereft of important healthcare information.

Source: Response to Questions for the Record, Michelle Turano, House Energy and Commerce Committee, 9/22/16

Questions?

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